Supreme Court, U.S.
FILED

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

GIBSON GUITAR CORPORATION,
Petitioner,

v.

MEC IMPORT
HANDELSGESELLSCHAFT GMBH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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122A

QUESTIONS PRESENTED FOR REVIEW

WHETHER FEDERAL COURTS MAY SET ASIDE AN ARBITRATION AWARD UNDER INTERNATIONAL LAW AS BEING IN "MANIFEST DISREGARD OF THE LAW"?

WHETHER AN AWARD WHICH VIOLATES THE TERMS OF A WRITTEN CONTRACT AND ARTICULATED PRINCIPLES OF CODIFIED INTERNATIONAL LAW VIOLATES THE STANDARD OF "MANIFEST DISREGARD OF THE LAW"?

LIST OF ALL PARTIES IN SIXTH CIRCUIT COURT OF APPEALS

Petitioner

Gibson Guitar Corp: which is a privately owned corporation

Respondent

MEC Import Handelsgesellschaft GMCB: a German national corporation

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The opinion of the United States Court of Appeals for the Sixth Circuit is included in the Appendix as Appendix A. The Opinion of the District Court for the Middle District of Tennessee is included in the Appendix as Appendix B.

STATEMENT OF BASIS FOR JURISDICTION

This Petition for Writ of Certiorari is filed within 90 days of the opinion rendered by the Sixth Circuit Court of Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

BRIEF STATEMENT OF THE CASE

This appeal requests the articulation of a standard by which lower courts can examine awards in international arbitrations, with particular reference to an arbitration award of lost profits to a German distributor of Gibson products despite an express provision in the controlling contract that precluded the award of lost profits. Gibson and its distributor entered into a Distribution Agreement (App. D) in which they agreed:

> Neither party to this agreement shall be liable by reason of termination or expiration of this agreement to the other for compensation, reimbursement, or damages on account of any loss of prospective profits on anticipated sales or due to expenditures, investments, leases or other commitments to the business or the good will of either party.

Id., p. 52a. In its Award (App. C), the Tribunal acknowledged this language and did not find any ambiguity as to the intended effect of the language, holding that "[t]aken alone it would, we believe, be conclusive against the claims made by MEC." Id., p. 38a. Yet, the Tribunal proceeded to render a large award based upon MEC's "standard profit margin" that is completely at odds with the parties' expressed intent.

Gibson has not challenged the factual basis for the award; rather, it has alleged that it is entitled to the enforcement of its legal rights as established by the contract between the parties. Briefly, the salient facts are these:

The parties entered into a Distribution Agreement which terminated according to its terms. Following termination, Petitioner agreed to continue to fulfill purchase orders submitted by Respondent. Petitioner received purchase orders from the Respondent, but did not receive payment in accordance with the terms of the Distribution Agreement. Petitioner did not fill the purchase orders.

Pursuant to the provisions of the Distribution Agreement requiring arbitration of disputes, the parties proceeded to an arbitration of the Respondent's claim for "lost profits". The Arbitral Tribunal held that it would apply internally recognized principles of contract law. Id., p. 25a. While acknowledging its concern with the provisions of the Distribution Agreement forbidding the award of lost profits (Id., p. 38a.), the Arbitral Tribunal awarded the Respondent lost profits. Id., p. 43a.

The Arbitral Tribunal did not discuss MEC's obligation to make payment for these guitars or the availability of alternative remedies. The Arbitral Tribunal concluded that the Distribution Agreement required that MEC pay for its orders by "Check or cash in advance with a 5% discount (except special offer items which are net cash" (Id., p. 33a.) and noted, moreover, that no letter of credit was ever posted. The Arbitral Tribunal also noted the existence of a term which would have appeared to limit MEC's remedy to specific performance:

> In the event of the termination of this agreement, COMPANY has the obligation to deliver all backorders of currently available products, as soon as it becomes available. App. D, p.52a.

While the remedy of specific performance would have resolved the Arbitral Tribunal's acknowledged concern about awarding lost profits in contravention of the terms of the purchase order, the Tribunal did not discuss this remedy.

Petitioner filed a Motion to Vacate Award in the United States District Court for the Middle District of Tennessee which was ultimately denied. App. B. The District Court's holding was affirmed on appeal. App. A.

Gibson Guitar Corp. is a manufacturer and worldwide distributor of musical instruments. It enjoys a reputation of providing some of the best musical instruments, including guitars, that are made. It is not, however, a behemoth conglomerate with billions in revenue and market power sufficient to protect its interests outside the legal process; rather, Gibson Guitar Corp. is the perfect example of a corporation which has built a recognized brand name to achieve success in international markets and, in the process, become dependent upon certainty in international commerce to protect both its business interests and its reputation.

ARGUMENT

DISCUSSION OF IMPORTANCE OF ISSUE 1:

FEDERAL COURTS MUST BE EMPOWERED BY THIS COURT TO SET ASIDE AWARDS IN INTERNATIONAL ARBITRATION WHICH HAVE BEEN AWARDED IN "MANIFEST DISREGARD OF THE LAW".

This Court should articulate the standard by which awards in international arbitrations may be set aside under the laws of the United States. Although some Circuit Courts have

addressed this issue, this Court has never articulated the standard of review of an award in international arbitration.

There are two reasons why this Court should articulate this standard. First, this Court has established a presumption in favor of the enforcement of arbitration awards which, absent an articulated standard for the review of international awards, discourages lower courts from reviewing such awards. Second, our rapidly expanding "global economy" has created an acute need for an articulated standard for review that binds all lower courts.

In this appeal, Gibson urges upon this Court the necessity of articulating the standard that awards in international arbitrations may be set aside as being in "manifest disregard of the law". Gibson asserts that this standard of review is available under both the Federal Arbitration Act and the "New York Convention".

The Federal Arbitration Act articulates a national policy in favor of the enforcement of arbitration awards while defining the conditions under which an award might be set aside. Under Section 10 of the FAA, a party may request that an award be vacated on a number of grounds, including the statutory ground that the arbitrators "exceeded their powers." 9 U.S.C. § 10(a)(4).

The Sixth Circuit, among others, has recognized that a federal court may, under the FAA, vacate an arbitration award where the arbitrator's decision was "in manifest disregard of the law." Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 135, 136 (6th Cir. 1996); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (quoting Wilko v. Swan, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953)). "Although the parties have bargained for a resolution by way of arbitration, a blatant disregard of the

applicable rule of law will not be tolerated." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d at 421. Gibson urges this Court to formally adopt this standard of review.

Gibson acknowledges that the "manifest disregard" standard of review is narrow. It is well established that a mere error in the interpretation or application of law is insufficient to meet this standard. Id. As set forth by this Court in the Glennon decision, in order for a decision to be in manifest disregard of the law:

> [T]he decision must fly in the face of clearly established legal precedent [citing Merrill Lynch, 70 F.3d at 421]. An arbitration panel only acts in manifest disregard of the law if the applicable legal standard is clear and well settled and it refuses to follow that legal principle.

Glennon, 83 F.3d at 136; *see also* M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 851 (6th Cir. 1996) (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (6th Cir. 1986)). Notwithstanding the narrowness of this standard, it is important that the Court hold that this standard is available to litigants such as Gibson whose rights have been consciously ignored in contravention of international and domestic law.

Gibson also urges this Court to find that the "manifest disregard of the law" standard is available under another chapter of the FAA. In 1958, Congress adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C. § 201, et seq. (commonly referred to as the "New York Convention"). Article I(1) of

the New York Convention sets forth that the New York Convention is applicable to awards made in the territory of a State other than the State where the enforcement is sought (not applicable to these facts), as well as to awards "not considered as domestic awards." Under the New York Convention, the district court's role in reviewing a foreign award is also limited: "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207.

DISCUSSION OF IMPORTANCE OF ISSUE 2:

CERTAINTY IN INTERNATIONAL COMMERCE REQUIRES ENFORCEMENT OF CODIFIED STANDARDS OF LAW AND, THEREFORE, THE ENFORCEMENT OF THE EXPRESS TERMS OF WRITTEN CONTRACTS.

Certainty in international commerce requires enforcement of the terms of a contract and enforcement of international treaties establishing codified law. The award of lost profits in this case violates both standards.

The contract precluded the award of lost profits. The parties had expressly agreed:

> Neither party to this agreement shall be liable by reason of termination or expiration of this agreement to the other for compensation, reimbursement, or damages on account of any loss of prospective profits on anticipated sales or due to expenditures, investments, leases or

other commitments to the business or the good will of either party.

The Tribunal acknowledged this agreement and consciously elected to ignore its effect.

In purporting to apply "principles of international law" to support the award of lost profits despite these provisions of the Distribution Agreement, the Tribunal ignored the Vienna Convention on the International Sales of Goods which expressly controlled the business relations of the parties. As a result, the Arbitral Tribunal arrived at a result that is precluded by that body of law which Germany and the United States agreed would control the business relationship between these parties.

The Vienna Convention is a self-executing treaty between the United States and other signatories including the Federal Republic of Germany. U.N. Conference on Contracts for the International Sale of Goods - Official Records 178-190 (U.N. Doc. A/Conf. 97/16; Sales No. E. 82. V.5 (1981); 19 Int'l Legal Materials 668-699 (1980); reprinted at 15 U.S.C.A. Appendix (West 1997) (App. E). The Vienna Convention applies to contracts for the sale of goods between parties whose places of business are in different countries (called "States" in the Vienna Convention) and both States are "Contracting States," that is to say, countries that have ratified the Vienna Convention. See Delchi Carrier v. Rotorex Corp., 71 F.3d 1024, 1027 & n. 1 (2d Cir. 1995).

The Vienna Convention required the enforcement of the parties agreement to exclude liability for lost profits. Article 6 is based on the "primacy of contract," which is the "dominant theme of the Convention." United States State Department Legal Analysis, reprinted at 15 U.S.C.A.

Appendix E (West 1997). The Vienna Convention requires enforcement of the express terms of the Distribution Agreement precluding the award of lost profits.

It should be noted that these provisions of the Vienna Convention are consistent with the law of the United States. Section 2-719(3) of the Uniform Commercial Code provides that "consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." *See e.g.*, Aquascene, Inc. v. Noritsu American Corp., 831 F. Supp. 602 (M.D. Tenn. 1993).

The award of lost profits not only violated the provisions of the Vienna Convention requiring the enforcement of the contractual terms of the Distribution Agreement, it ignored the remedy of specific performance that was required by the Vienna Convention, again consistent with the law of the Uniform Commercial Code. The Distribution Agreement provided:

> "In the event of the termination of this agreement, COMPANY has the obligation to deliver all back orders of currently available products, as soon as it becomes available."

Article 46(1) of the Vienna Convention expressly provides that, in the event of the seller's breach, the buyer "may require performance by the seller of his obligations." Further, specific performance is the remedy that would be proper under Section 2-716(1) of the Uniform Commercial Code. Specific performance was not only a remedy required by international law, but one which allowed the Tribunal to render an award that was consistent with its factual findings without consciously ignoring the express "limitation of

damages" provisions of the Distribution Agreement which it admitted were enforceable.

The ruling of the Arbitral Tribunal consciously violated the handwritten terms of the Distribution Agreement and ignored the controlling law of the Vienna Convention. If allowed to stand, parties to international commerce cannot enter into contracts with certainty of their enforcement and will be dissuaded from using arbitration to resolve their disputes with foreign nationals.

CONCLUSION

The lower courts lacked controlling precedent establishing their duty to vacate arbitration awards that consciously ignore controlling principles of international law. The Distribution Agreement provides that neither party shall be liable to the other for "damages on account of any loss of prospective profits on anticipated sales"; yet, the Tribunal awarded lost profits. It purported to rely on "internationally recognized principle of contract law", yet failed to acknowledge the controlling provisions of the Vienna Convention which required the enforcement of the contract and mandated the remedy of specific performance. The District Court, lacking a controlling standard of review, was constrained to allow the award to stand. Accordingly, this case presents an opportunity for this Court to articulate the standard of review of awards rendered in international arbitrations, and thereby to assure the enforcement of international laws assuring participants in the global economy that their contracts are enforceable as written.

Respectfully Submitted,

/s/_____

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: November 17, 1999]

No. 98-6046

GIBSON GUITAR CORP.,
Plaintiff- Appellant

v.

MEC IMPORT
HANDELSGESELLSCHAFT GMBH,
Defendant - Appellee

On Appeal from the United States District Court
for the Middle District of Tennessee

BEFORE: KRUPANSKY and RYAN, Circuit Judges; and HULL,[1] District Judge.

[1] The Honorable Thomas Gray Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

PER CURIAM. Plaintiff-Appellant, Gibson Guitar Corp. ("Gibson"), appeals from the order of the district court denying the plaintiff-appellant's Motion to Vacate Arbitration Award, and to Stay Proceedings to Enforce Arbitration Award, and granting the Motion to Confirm Award filed by the defendant-appellee MEC Import Handelsgesellschaft GMBH ("MEC"). For the reasons set forth below, we AFFIRM the decision of the district court.

I. BACKGROUND

On August 11, 1993, Gibson filed suit in the United States District Court for the Middle District of Tennessee, seeking to compel arbitration. MEC then filed a motion to dismiss the complaint alleging that arbitration was not an appropriate remedy. Subsequently, the parties agreed to a Consent Order entered on June 16, 1994, which stipulated that the case would be submitted to arbitration on certain terms.

On December 18, 1997, MEC filed a notice advising the district court of two arbitration decisions rendered by the International Chamber of Commerce and Arbitral Tribunal of the International Court of Arbitration ("Arbitration Tribunal"). On April 28, 1997, the Arbitration Tribunal issued an "Interim Award" on the applicable law. On October 31, 1997, the Arbitration Tribunal issued an "Award" to MEC for $837,818.12, with interest at a rate of 7.2% from April 20, 1995, based on one of its three claims. Gibson then filed a motion to vacate the award, and MEC filed a motion to confirm the award.

After reviewing these motions and the proceedings before the Arbitration Tribunal, the district court concluded that "the 'root' of Gibson's objection to the arbitration award to MEC is the law applied," and that the arbitration award was made in "manifest

disregard of the law." The district court found that the Arbitration Tribunal's "interpretation or application" of law involved a choice of law rather than a refusal to follow well settled law, and that the Arbitration Tribunal's decision on the applicable law did not rise to the level of "manifest disregard of the law." Accordingly, the district court denied Gibson's Motion to Vacate Arbitration Award and granted MEC's Motion to Confirm Award.

Gibson now appeals the district court's decision. We find that the relevant inquiry, in regard to this appeal of the district court's decision confirming the arbitration award, is whether the Arbitration Tribunal acted in manifest disregard of the law, thereby compelling this court to set aside the award.

II. ANALYSIS

A. *Standard of review*

When reviewing a district court's order refusing to vacate an arbitration award, this court reviews the district court's findings of fact for clear error and its conclusions of law *de novo*. See *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 947-48 (1995); *AK Steel Corp. v. United Steelworkers of Am.,* 163 F.3d 403, 407 (6th Cir. 1998). Where the parties to a contract have agreed to submit their disputes to arbitration, a reviewing court must defer to the arbitrator's interpretation of the contract, unless the evidence presented reveals that the arbitrator's decision is in clear contradiction of the express terms of the contract. See *AK Steel,* 163 F.3d at 408. The review of an arbitrator's decision is "one of the narrowest standards of judicial review in all of American jurisprudence." *Lattimer-Stevens Co. v. United Steelworkers of Am.,* 913 F.2d 1166, 1169 (6th Cir. 1990), see also, *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 36 (1987).

A federal court may set aside an arbitration award under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, only when certain statutory or judicially created grounds are presented. *Merrill Lynch, Pierce, Fenner & Smith,* 70 F.3d 418, 420 (6th Cir. 1995). The FAA provides several statutory bases upon which a court may vacate an arbitration award, none of which are alleged by Gibson in this case. However, absent circumstances indicating that the arbitration process was tainted by the statutory grounds of fraud, corruption, or arbitrator misconduct, a federal court may also vacate arbitration awards made "in manifest disregard of the law." *Id.* at 421 (quoting *Wilko v. Swan,* 346 U.S. 427, 74 S. Ct. 182, 98 L.Ed. 168 (1953)). The manifest disregard of the law standard is very narrow; "[a] mere error in interpretation or application of the law is insufficient. Rather, the decision must fly in the face of clearly established legal precedent." *Merrill Lynch, Pierce, Fenner & Smith,* 70 F.3d at 421 (citation omitted). See *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 330 (6th Cir. 1998); *Glennon v. Dean Witter Reynolds, Inc,* 83 F.3d 132, 135-136 (6th Cir. 1996). An arbitration panel only acts in manifest disregard of the law if the applicable legal principle is clear and well-settled and it refuses to follow that legal principle. *Id.*

Defendant contends that the Arbitration Tribunal acted in manifest disregard of the law in violation of public policy and recognized legal principles, by applying "international principles of law," by ignoring established principles of international law, i.e., the Uniform Commercial Code and the Vienna Convention, by awarding loss profits in manifest disregard of the Uniform Commercial Code and the Vienna Convention, and by awarding prejudgment interest in manifest disregard of the Uniform Commercial Code and the Vienna Convention

B. The district court did not err in affirming the arbitrator's award

The pertinent parts of the Distribution agreement entered into by Gibson and MEC, and cited in the Award are as follows:

1. "Neither party to this agreement shall be liable by reason of termination or expiration of this agreement to the other for compensation, reimbursement, or damages on account of any loss of prospective profits on anticipated sales, or due to expenditures, investments, leases, or other commitments to the business, or the good will of either party.

   In the event of termination of this agreement, COMPANY has the obligation to deliver all backorders of currently available products, as soon as it becomes available."

2. "Should the parties have a serious disagreement relating to this contract, neither party shall seek redress against the other in any court or tribunal in any part of the world, but instead submit this agreement to arbitration. The matter to be arbitrated shall be submitted to the Arbitration Committee of the Chamber of Commerce of the State of Tennessee.

   Both parties shall permit the Committee *to exercise its own judgment as to the body of law it shall use in rendering its decision.* The decision of this Committee shall be fully

> and finally binding on both parties. Neither party shall have the fight to further appeal or redress in any other court or tribunal except solely for the purpose of obtaining execution of the judgment rendered by the Arbitration Committee. (Emphasis added).

3. "Neither party to this agreement shall be liable by reason of termination or expiration of this agreement to the other for compensation, reimbursement or damages on account of any loss of prospective profits on anticipated sales or due to expenditures, investments, leases, or other commitments to the business or the goodwill of either party."

In addition, a letter dated June 16, 1993, written by Glenn Derringer, who was Gibson's Director of International Sales, contains the following:

> In order to permit a smooth transition to a new distributor we afforded MEC a six month period to continue selling Gibson epiphone guitars including strings and accessories. During this time period we will accept and deliver product received on confirmed purchase orders from MEC and will continue to supply these products through August 31, 1993 to the best of our ability in accordance with our regular production schedules."

Gibson's position is that MEC'S claims are defeated by the plain words of the Distribution Agreement. However, the Arbitration Tribunal concluded in its Interim Award dated April 28, 1997, that

the Distribution Agreement constitutes the law between the parties and that its terms cannot be overridden by the national law of either of the contracting parties. Therefore, Gibson's argument in regard to any manifest disregard for the Uniform Commercial Code and the Vienna Convention are without merit, because it was never the agreement of the parties that any particular body of law would be used during arbitration.

Because the parties agreed that the Arbitration Tribunal could exercise its own judgment as to the body of law it would use in rendering its decision, and that the decision of the Arbitration Tribunal was fully and finally binding on both parties, the contract constitutes the law between the parties. We must defer to the arbitrator's interpretation of the contract unless the evidence presented reveals that the arbitrator's decision is in clear contradiction of the express terms of the contract. See *AK Steel,* 163 F.3d at 408.

Although the issue of interest, such as the pre-award interest which was awarded by the Arbitration Tribunal, is not addressed by the terms of the contract, an "arbitration award under the Federal Arbitration Act may include pre-award interest on the compensatory portions of an award when the amount of the underlying liability can be ascertained with some certainty." *Peoples Security Life Insurance Co. v. Monumental Life Insurance Co.,* 991 F.2d 141, 148 (4th Cir. 1993). The issue of prejudgment interest breaks down into two separate inquiries, i.e. pre-award prejudgment interest and post-award prejudgment interest. It is within the discretion of the arbitrators to decide whether interest is taxed on a claim prior to the entry of an arbitration award. See *Sun Ship, Inc. v. Matson Navigation Co.,* 785 F.2d 59, 63 (3d Cir. 1986): ("The arbitrators were concerned with interest to the date of their award.") Because the orders which formed the basis of the award of loss of profits

were identified and ascertained with some certainty, the Arbitration Tribunal did have the discretion to assess pre-award interest against Gibson as an equitable remedy, and this assessment was not a manifest disregard of the law.

We find that the evidence and the findings of the Arbitration Tribunal in this case are not in clear contradiction of the express terms of the contract. Nor does the Arbitration Tribunal's interpretation of the contract "fly in the face of clearly established legal precedent." *Merrill Lynch, Pierce, Fenner & Smith,* 70 F.3d at 421. Therefore, Gibson has failed to show that the Arbitration Tribunal acted in manifest disregard of the law, and accordingly, Gibson has failed to establish a basis for this court to set aside the award.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the district court's decision.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

(Filed: June 23, 1998)

No. 3:93-0663

GIBSON GUITAR CORPORATION)
)
v.)
)
MEC IMPORT)
HANDELSGESELLSCHAFT GMBH)
)

MEMORANDUM

Pending before the Court is Plaintiff's Motion to Vacate Arbitration Award, to Stay Proceedings to Enforce Arbitration Award and Request for Oral Argument (Docket No. 49) and Defendant MEC's Motion to Confirm Award (Docket No. 54). For the reasons described herein, Plaintiff's Motions (Docket No. 49) are DENIED and Defendant's Motion (Docket No. 54) is GRANTED.

I. Background

On August 11, 1993, nearly five years ago, Gibson Guitar Corporation ("Gibson"), Plaintiff, filed the Complaint (Docket No.

1) in this case against MEC Import Handelsgesellschaft GMBH ("MEC"), Defendant. Gibson, in the Complaint, requested an order compelling MEC to arbitrate their dispute over a distribution agreement for Germany and Austria.

MEC subsequently filed a Motion (Docket No. 7) to dismiss the Complaint on the ground that arbitration was not an appropriate remedy, as well as other grounds. Judge Thomas A. Wiseman, Jr. denied the Motion by Order (Docket No. 25) and Memorandum (Docket No. 24) entered on May 19, 1994. In the Memorandum, the Court concluded that it had authority to appoint an arbitrator in this case and indicated it would entertain a motion by Gibson for the Court to order arbitration and appoint an arbitrator.

The parties subsequently agreed to a Consent Order (Docket No. 31) entered on June 16, 1994 which stipulated that the case would be submitted to arbitration on certain terms.

The case was reassigned to this Court by Order (Docket No. 33) entered on January 7, 1996. Meanwhile, the case was in arbitration. (Docket Nos. 36, 40, 41, and 44).

On December 18, 1997, MEC filed a Notice of Filing (Docket No. 47) advising this Court of two arbitration decisions rendered by the International Chamber of Commerce and Arbitral Tribunal of the International Court of Arbitration ("Arbitration Tribunal"). On April 28, 1997, the Arbitration Tribunal issued an "Interim Award" on the applicable law. On October 31, 1997, the Arbitration Tribunal issued an "Award" to MEC for $837,818.12, with interest at 7.2% from April 20, 1995, based on one of its three claims.

Subsequently, Gibson filed its Motion to Vacate Arbitration Award (Docket No. 49) and MEC filed its Motion to Confirm Award (Docket No. 54). The "root" of Gibson's objection to the arbitration award to MEC is the law applied. (Plaintiff's Memorandum, Docket No. 50, p. 4).

II. Discussion

Gibson, pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 6 and 10, moves to vacate the arbitration Award on the grounds that it was made in "manifest disregard of the law." (Plaintiff's Motion, Docket No. 49, p. 2). Gibson claims that the Arbitration Tribunal's:

> ". . . adoption of the nebulous and unarticulated standard of "international law" in the Award was made in manifest disregard of the express language of the parties' subject Distribution Agreement and the public policy and recognized legal principles evidenced in the Uniform Commercial Code and United Nations Convention on Contracts for the International Sales of Goods."

(Plaintiff's Memorandum, Docket No. 50, p. 1).

This Court may set aside an arbitration award under the FAA when certain statutory or judicially created grounds are established. Glennon v. Dean, Witter, Reynolds, Inc., 83 F.3d 132, 135 (6th Cir. 1996). In addition to the grounds specified in the FAA, the Sixth Circuit has recognized that this Court can vacate an arbitration aware where the arbitrator's decision was "in manifest disregard of the law." Id. at 136; Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995).

Gibson, in its Memorandum, correctly acknowledges that the "manifest disregard of the law" standard is very narrow. (Plaintiff's Memorandum, Docket No. 50, p. 11). Gibson further properly notes that it "is well established that a mere error in the interpretation or application of law is insufficient to meet this standard." Id. As stated by the Sixth Circuit in Glennon, in order for a decision to be in "manifest disregard of the law":

> . . . the decision must fly in the face of clearly established precedent [citing Merrill Lynch, 70 F.3d at 421]. An arbitration panel only acts in manifest disregard of the law if the applicable legal standard is clear and well settled and it refuses to follow that legal principle.

Glennon, 83 F.3d 136.

In this case, the Arbitration Tribunal ruled in the Interim Award that the following law applied to the claim upon which damages were awarded:

> This issue is to be resolved by reference to the terms of the contract interpreted according to international recognized principles of contract law and the facts as established at the hearing on the merits. It is not necessary to apply any specific national law to determine the issue.

(Interim Award, Docket No. 47, p. 5; Award, Docket No. 47, p. 3).

The Arbitration Tribunal, in explaining its decision, noted that the underlying "Distribution Agreement" contains no choice of

law clause. That issue is expressly left to the arbitrator's judgment under the terms of the arbitration clause which reads as follows:

> Should the parties have a serious disagreement relating to this contract, neither party shall seek redress against the other in any court or tribunal in any part of the world, but instead submit this agreement to arbitration. The matter to be arbitrated shall be submitted to the Arbitration Committee of the Chamber of Commerce of the State of Tennessee.
>
> Both parties shall permit the Committee to exercise its own judgment as to the body of law it shall use in rendering its decision. The decision of this Committee shall be fully and finally binding on both parties. Neither party shall have the right to further appeal or redress in any other court or tribunal except solely for the purpose of obtaining execution of the judgment rendered by the Arbitration Committee.
>
> The parties agree to share equally all costs and expenses of such arbitration proceedings, irrespective of its outcome.

(Id. at p. 2). (Emphasis added). Thus, the parties expressly agreed that the arbitrators would exercise their own judgment as to what law should be applied.[1]

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[1] The Terms of Reference (Docket No. 47, p. 6) signed by both parties on March 14, 1996 also states: "As noted in the Arbitration clause

The Arbitration Tribunal, in the Interim Award, thereupon made the following findings:

> 1. In their respective submissions the parties have canvassed all of the traditional conflict of laws principles, each urging that a proper appreciation of those principals leads to the application of their own national law. As is not uncommon in matters of this kind different but perfectly acceptable principals of conflict of laws can lead to diametrically opposite results. The distribution agreement was made in the United States of America, a factor which the Defendant urges upon us as one of the grounds for applying the law of Tennessee. On the other hand the execution of the distribution obligations assumed by the Claimant were carried out in Germany and Austria, a factor which the Plaintiff submits should lead to a finding that the contract is subject to German law.
>
> 2. In our view however both the terms of the contract and the circumstances in which it was executed indicate that neither party intended that any national law should apply to defeat or vary any of the agreements which it embodies.
>
> 3. This was a contract made, negotiated and executed between two commercial enterprises. There is no suggestion in the pleadings that there

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the Arbitral Tribunal is to exercise its own judgment as to the applicable law."

was aa inequality of bargaining power nor is any claim made that the contract is vitiated in whole or in part by the conduct of a party at a time it was made. The parties have specifically agreed that the Arbitration Committee shall "exercise its own judgment as to the body of law it shall use in rendering its decision."

4. We are satisfied that both parties intended that their relationship should be governed by the terms of the contract which is the law between the parties. We find therefore that to the extent that the national law of either of the parties may be at odds with rights or obligations which are expressed in the contract, then the contract interpreted according to internationally recognized principles of contract law must prevail.

5. In summary then we conclude that the issue to be determined on the merits is whether the defendant is in breach of the agreement expressed in the contract. This is essentially a question of fact. With reference to the issues as stated in the Terms of Reference, our findings therefore are as follows:

> (a) "As to the claim for damages in an approximate amount of DM 1.3 million for the alleged failure of the Defendant to supply product ordered after February 28, 1993.
>
> (i) What law properly applies to this aspect of the claim?"

> This issue is to be resolved by reference to the terms of the contract interpreted according to internationally recognized principles of contract law and the facts as established at the hearing on the merits. It is not necessary to apply any specific national law to determine the issue.

(Id. at pp. 4 and 5).

In the Award, the Arbitration Tribunal reaffirmed its finding in the Interim Award regarding the applicable law. (Award, Docket No. 47, pp. 3 and 4).

The Court finds that the Arbitration Tribunal's decision on the applicable law does not rise to the level of "manifest disregard of the law," which is required to vacate an arbitration award. The heart of Gibson's objection is the Arbitration Tribunal's "interpretation or application" of choice of law rules rather than a refusal to follow well settled law. This is insufficient to vacate an arbitration award. Jaros, 70 F.3d 421; Glennon, 83 F.3d 136.

This is especially so under the circumstances here where the parties clearly authorized the arbitrator to "exercise its own judgment as to the body of law it shall use in rendering its decision." This is a sweeping provision that Gibson voluntarily agreed to accept, filed this case to compel MEC to follow, and now must live with notwithstanding the adverse consequences. The Interim Award and the Award, moreover, do not indicate that the Arbitration Tribunal abused its discretion in exercising its judgment on the applicable law.

The Court declines to award attorneys' fees to MEC. MEC's conduct in initially delaying the arbitration, and then jointly

allowing this case to drift for nearly five years, should not be encouraged by an award of attorneys' fees.

It is so ORDERED.

/s/_____
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

(Filed: June 23, 1998)

No. 3:93-0663

GIBSON GUITAR CORPORATION)
)
v.)
)
MEC IMPORT)
HANDELSGESELLSCHAFT GMBH)
)

ORDER

Pending before the Court is Plaintiff's Motion to Vacate Arbitration Award, to Stay Proceedings to Enforce Arbitration Award and Request for Oral Argument (Docket No. 49) and Defendant MEC's Motion to Confirm Award (Docket No. 54). For the reasons stated in the accompanying Memorandum, Plaintiff's Motions (Docket No. 49) are DENIED and Defendant's Motion (Docket No. 54) is GRANTED.

The arbitration Award in favor of MEC against Gibson in the amount of $837,818.12, with interest at 7.2 % from April 20, 1995, is confirmed and judgment is entered accordingly.

It is so ORDERED.

/s/_____
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a), FRCP, on 6/23/98
By: /s/_____

APPENDIX C

INTERNATIONAL COURT OF ARBITRATION
COUR INTERNATIONALE D'ARBITRAGE

[Dated October 31, 1997]

No. 8628/CK

MEC IMPORT & HANDELSGESELLSCHAFT MBH
(Germany)

vs.

GIBSON GUITAR CORPORATION
(U.S.A.)

This document is an original of the award rendered in conformity with the Rules of the ICC International Court of Arbitration.

* * * * *

Ce document est un original de la sentence rendue conformément au Règlement de la Cour Internationale d'Arbitrage de la CCI.

International Court of Arbitration Award - 10-31-97

BETWEEN:

MEC IMPORT & HANDELSGESELLSCHAFT MBH (Germany)

Claimant

and

GIBSON GUITAR CORPORATION (U.S.A.)

Defendant

AWARD

I. Introduction

This arbitration arises from an agreement (the "Distribution Agreement") executed as of September 20, 1990 and covering the period from March 1, 1990) to February 28, 1993 between the Claimant MEC Import GMBH ("MEC") and the Defendant Gibson Guitar Corp. ("Gibson") under which MEC acted as distributor of Gibson guitars and other products in Germany and Austria. By virtue of an arrangement made in March 1993 after the expiration date of the Distribution Agreement, the true nature and duration of which is in dispute, MEC continued to place and Gibson continued to honour orders until August 12, 1993. On that date Gibson, responding to a lawyer's letter sent on behalf of MEC on July 20, 1993, advised that business relations between the parties had come to an end.

II The Claims

These proceedings were initiated by a letter from counsel for the Claimant addressed to the ICC Court of International Arbitration dated April 18, 1995. As set out in that letter and subsequent correspondence, MEC advanced three claims:

1. A claim for damages in an approximate amount of DM 1.3 million for the alleged failure of the Defendant to supply product ordered after February 28, 1993;

2. A claim for damages in an approximate amount of DM 900,000 on the ground that at the time the agreement terminated investments made by the Claimant at the Defendant's request had not yet been amortized;

3. A claim for compensation in an approximate amount of DM 160,000 founded on Art. 89(b) of the German Law of Agencies.

By its response dated July 11, 1995 the Defendant, relying essentially on the terms of the Distribution Agreement, denied all liability.

III The Issues

The issues for determination were agreed by the parties in Terms of Reference executed on March 14, 1996. They are the following:

1. "As to the claim for damages in an approximate amount of DM 1.3 million for

the alleged failure of the Defendant to supply product ordered after February 28, 1993:

(i) What law properly applies to this aspect of the claim?

(ii) Was the Defendant under any legal obligation to fulfil orders placed by the Claimant subsequent to February 28, 1993? and if so;

(iii) Did the Defendant fail to fulfil any such orders and thereby breach its legal obligation? and if so;

(iv) Did the Claimant thereby suffer loss or damage and if so in what amount?

2. As to the claim for damages in an approximate amount of DM 900,000 on the ground that at the time the agreement terminated investments made by the Claimant at the Defendant's request had not yet been amortized.

(i) What law properly applies to this aspect of the claim?

(ii) Interpreted in the light of the applicable law does the contract support the claim made? and if so;

(iii) Were any investments made by the Claimant at the Defendant's request which were not amortized at the time the contract was terminated? and if so;

(iv) What is the amount of the loss?

3. As to the claim for compensation in an approximate amount of DM 160,000 founded on Art. 89b of the German Law of Agencies.

(i) Is the German Law of Agencies applicable in the circumstances? and if so;

(ii) Does that law support the claim made?"

IV The Applicable Law

At the request of the parties, the question of the applicable law as set out in each of the issues quoted above was settled by an Interim Award issued by the Tribunal on April 28, 1997. In that Interim Award we held as follows:

"(a) As to the claim for damages in an approximate amount of DM 1.3 million for the alleged failure of the Defendant to supply product ordered after February 28, 1993.

(i) What law properly applies to this aspect of the claim?

This issue is to be resolved by reference to the terms of the contract interpreted according to internationally recognized principles of contract law and the facts as established at the hearing on the merits. It is not necessary to apply any specific national law to determine the issue.

(b) As to the claim for damages in an approximate amount of DM 900,000 on the ground that at the time the agreement terminated investments made by the Claimant at the Defendant's request had not yet been amortized.

(i) What law properly applies to this aspect of the claim?

This issue is to be resolved by reference to the terms of the contract interpreted according to internationally recognized principles of contract law and the facts as established at the hearing on the merits. It is not necessary to apply any specific national law to determine the issue.

(c) As to the claim for compensation in an approximate amount of DM 160,000 founded on Article 89b of the German Law of Agencies.

(i) Is the German Law of Agencies applicable in the circumstances? and if so;

(ii) Does that law support the claim made?

We find that the German Law of Agencies does not apply and that in consequence no claim lies under Article 89(b) of that law."

V The Facts

Hearings were held in Nashville, Tennessee on August 14 and 15, 1997 at which the parties, both of whom were represented by counsel, presented *viva voce* evidence and argument in support of their respective positions. The Tribunal wishes to thank counsel for their extremely thorough and able presentations which were of great assistance.

The factual background to this dispute as set out in the pleadings and as i: emerged from the evidence may be summarized as follows:

Gibson Guitar was acquired by its present owners in 1986 at a time when its business was at a low ebb. Their efforts in the intervening years have restored the company to prosperity and reestablished its enviable world wide reputation as a leading manufacturer of guitars and accessories.

MEC was formed in 1986 by its principals Gerhard Würstner and Friedemann Veyhle to act as a distributor of Gibson products in Germany and Austria. Gibson's European market was

virtually non-existent at the time. The evidence shows that sales made by MEC grew steadily from 1986 to 1993 except only in 1992 in which there was a slight decline over the previous year.

From 1986 until 1990, the distributor contract between the parties was verbal. In 1990 Gibson decided that for the future its distributor contacts world wide should be in writing and a distribution agreement intended for use by all distributors was prepared. While Gibson's intention was that the contract should be signed without amendments, MEC objected and following discussions executed the Distribution Agreement with a number of amendments all of which appear as hand written deletions and additions to the printed text. The term stipulated was three years. The relevant clause reads as follows:

> "The term of the agreement is exactly from:
>
> March 1, 1990 to February 28, 1993
>
> **This agreement will automatically terminate at the end of this period of time. This agreement is not continuous, and cannot be renewed If the relationship is satisfactory to COMPANY, COMPANY may offer a new agreement to DISTRIBUTOR but is under no obligation to do so."**
>
> (emphasis in original)

Termination during the term of the contract was dealt with in a clause which provides in part as follows (here and elsewhere hand - written modifications are shown in italics).

"COMPANY shall have the right to terminate this agreement with 60 days written *notice* at its option, if the DISTRIBUTOR:

(1) has a 50% or greater change in ownership or senior management;

(2) files bankruptcy;

(3) fails to honor payment terms;

(4) willfully submits fraudulent reports, or does not submit required reports, as specified in this contract;

(5) fails to honor any commitments made in this contract, including minimum sales targets.

To effect termination, *either party* must give *the other* one obligatory notice of dissatisfaction, which allows *either party* a 30 day grace period to correct any deficiency of the items listed above, except for item (2). If such deficiency has not been corrected, the termination will be effective at the earlier of 60 days from the date written notice is given *to the other party* or the last day of the term of this agreement, as specified on Page 1."

* * * *

"Neither party to this agreement shall be liable by reason of termination or expiration of this agreement to the other for compensation, reimbursement, or

damages on account of any loss of prospective profits on anticipated sales, or due to expenditures, investments, leases, or other commitments to the business, or the good will of either party.

In the event of termination of this agreement, COMPANY has the obligation to deliver all backorders of currently available products, as soon as it becomes available."

The Arbitration clause reads as follows:

"Should the parties have a serious disagreement relating to this contract, neither party shall seek redress against the other in any court or tribunal in any part of the world, but instead submit this agreement to arbitration. The matter to be arbitrated shall be submitted to the Arbitration Committee of the Chamber of Commerce of the State of Tennessee.

Both parties shall permit the Committee to exercise its own judgment as to the body of law it shall use in rendering its decision. The decision of this Committee shall be fully and finally binding on both parties. Neither party shall have the right to further appeal or redress in any other court or tribunal except solely for the purpose of obtaining execution of the judgment rendered by the Arbitration Committee.

> The parties agree to share equally all costs and expenses of such arbitration proceedings, irrespective of its outcome."

Mr. David H. Berryman, the President of Gibson, testified that by 1992 he was dissatisfied with MEC's performance. It was his view that growth in the German market was not keeping pace with Gibson's overall growth rate and that a better job could be done. He testified that he met with MEC in Germany in July 1992. He told the Tribunal that he was not impressed with their premises which he considered to be sparse and lacking a proper showroom. He felt that Mr. Veyhle lacked his own dedication to the musical instrument business. He described MEC's operation overall as being "meagre".

Mr Berryman testified however that notwithstanding the views which he held in July 1992, Gibson made no decision regarding the renewal or non-renewal of the Distribution Agreement at any time in 1992. That decision, he told us, was made only at the Frankfurt Music Fair held in March 1993. We were advised that this is the largest music fair in the world and a presence at it would be of capital importance both for MEC as a distributor and Gibson as a manufacturer.

As far as the record shows, concerns about MEC's sales performance were expressed in writing for the first time in a fax dated January 3, 1993[1] sent to Mr. Würstner by Glenn Derringer,

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[1] Factual Appendix in Support of Gibson Guitar Corporation's Submission to ICC Arbitrations Tab A.

then Gibson's Director of International Sales. The text of the fax in question is as follows:

> "As is customary, we review each distributor's yearly sales figures compared with previous years and current targets. Given your overall 1992 target of $2,255,000 US agreed to last March MEC's current projected year end sales totals in most product categories are seriously below acceptable levels. This is not consistent with what has occurred throughout much of central European and really concerns Henry, Dave and myself.
>
> Friedemann it is necessary for us to consider various alternatives and I would like to thoroughly address this situation when we meet in Anaheim. We can continue our discussions when you and Gerhard visit Nashville as well. I have made the necessary hotel reservations and we look forward to hosting you at Gibson."

On January 20, 1993, Mr. Derringer met with the principals of MEC, Gerhard Veyhle and Friedemann Würstner in Nashville. It is common ground that Mr. Derringer advised MEC at that meeting that Gibson would be appointing a new distributor for Austria after the upcoming Frankfurt Fair.

The fair ended on March 7th and on that day a meeting was held between Messrs. Juszkiewicz, Berryman, Yarborough and Derringer on behalf of Gibson. Both parties agree that MEC was advised at that meeting that Gibson had decided to make a change

of distributor in Germany. Mr. Derringer's memorandum to file[2] concerning the meeting reads as follows:

> "I indicated to Gerhard and Friedemann that we have given a great deal of thought to the German distribution situation and we have decided to make a change in Germany. I stated that this was not an easy decision but the sales of products through the 1992/1993 period fell short of their goals and that this has occurred on a continuous basis even more than the past year.
>
> I stated that it was our desire to allow a smooth transition to a new distributor and that we would allow them six months in which to continue to sell Gibson/Epiphone products.
>
> Gerhard indicated that they had taken orders at the show and I stated that we would fulfill these orders and any others that they placed during the six month period. However, fulfilling these orders would be dependant on our normal production capacity.
>
> Henry then reiterated that we want to make a smooth transition and that we want them to be able to sell as much product as possible during the transition process.
>
> Both Gerhard and Friedmann did not wish to discuss the matter further and I offered that I would stay on

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[2] *id.* Tab C.

> an extra drew days to visit them at their office; and discuss the orders for the remaining six months along with whatever else they desired regarding the transition period. Tentatively, the meeting was set for Tuesday or Wednesday, March 9th or 10th."

Mr. Derringer met with Mr. Wüstner and Mr. Veyhle again on March 10th. Mr. Derringer's memorandum of this meeting[3] opens with the following paragraph:

> "We discussed the situation regarding our decision to change distributors in Germany. I reiterated that it was our intent to make this a smooth transition and that I would recommend that they place orders for both Gibson and Epiphone products through August 1993."

In the same memorandum Mr. Derringer records that MEC was concerned about their terms of payment which up until that time had been cash in advance. The memorandum continues:

> "We discussed a method by which we could ship that both sides would feel secure. I suggested some type of standby L/C which Friedemann and Gerhard said they would investigate. In the meantime I indicated that perhaps the best way to accomplish continued shipments would be to have us release the guitars to their forwarder, they would then wire the funds and upon receipt of the wire we would release the goods to them. In this manner they could feel secure that

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[3] *id.* Tab D.

> the goods were actually available to MEC and we in turn would know that we still had control of the shipment. It was determined that until the standby L/C was set up we would work on this basis."

Although discussions concerning the letter of credit continued in subsequent months, no letter of credit was ever issued. In the meantime, however, orders continued to be placed by MEC and filled by Gibson.

On June 16, 1993 Mr. Derringer wrote to Messrs. Veyhle and Würstner to summarize, as he said, various points which had been discussed concerning the conduct of business between Gibson and MEC over the following three months. This letter[4] states *inter alia:*

> "It is understood that on March 5, 1993 we elected not to extend MEC a new distribution agreement for 1993/94. This occurred at a meeting of the Frankfurt Messe and we acknowledge receipt of your letter dated March 23, 1993 confirming this meeting.
>
> In order to permit a smooth transition to a new distributor we afforded MEC a six month period to continue selling Gibson epiphone guitars including strings and accessories. During this time period we will accept and deliver product received on confirmed purchase orders from MEC and will continue to supply these products though August 31,

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[4] *id.* Tab G.

> 1993 to the best of our ability in accordance with our regular production schedules."

To this letter MEC responded through American counsel who wrote a letter[5] to Mr. Derringer dated July 20th. That letter contended that the conduct of Gibson had been such that the distribution agreement had been renewed for a further three year period. In addition the letter threatened legal proceedings in Germany contrary to the terms of the Arbitration clause contained in the Distribution Agreement.

It is not clear when this letter came to the attention of anyone in a position of responsibility at Gibson, but on August 12th 1993, Mr. Derringer replied. His letter[6] stated *inter alia*:

> "Gerhard and Friedemann, as a gesture of goodwill, Henry agreed to supply you product for a period of six months after your distribution agreement expired. Your expensive legal action to inhibit our business in Germany cannot be taken lightly. As stated previously, there is a formal mechanism for arbitrating any disputes as allowed in our distribution agreement. Therefore by your threats you have broken our gesture of goodwill and we must therefore take our own appropriate action.
>
> As of this date, MEC cannot be considered our agent in Germany and no further shipments will occur.

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[5] *id.* Tab I.

[6] *id.* Tab J.

> Outstanding orders placed subsequent to the expiration of the agreement will be considered cancelled and any attempt by MEC to inhibit our future business in Germany will be dealt with appropriate legal action on the part of Gibson."

On the date Mr. Derringer's letter was written, MEC had outstanding back orders to a value of US $1,444,514 as calculated by MEC.

Mr. Berryman testified that he was "floored" when he first saw the lawyer's letter of July 20th. His reaction, he said, was that this was "Pearl Harbour", "an atomic bomb". He testified forcefully that he considered he was under no obligation to be dealing with MEC at all, that he was doing so as a pure accommodation to them, and that he considered there was no reason to continue doing business with or supplying product to a company which had sent such a letter.

VI Analysis

Gibson's position, as advanced by Mr. Falls, is that MEC's claims are defeated by the plain words of the Distribution Agreement. He relies on the Termination clause quoted above which provides in part that:

> "Neither party to this agreement shall be liable by reason of termination or expiration of this agreement to the other for compensation, reimbursement or damages on account of any loss of prospective profits on anticipated sales or due to expenditures, investments, leases, or other commitments to the business or the goodwill of either party."

The Tribunal has already concluded in its Interim Award dated April 28, 1997, that the Distribution Agreement constitutes the law between the parties and that its terms cannot be overidden by the national law of either of the contracting parties. Thus it was held that the claimant's claim for compensation under German agency law was unfounded.

The first issue for determination therefore is whether the Distribution Agreement remained in force after its stipulated expiry date notwithstanding the language employed in defining its term. The contention advanced by MEC in its original request for arbitration was that the parties had "agreed to renew the distributorship agreement. . . ." and that: "The parties now agree that the distributor agreement has come to an end by August 31, 1993."

A different position was taken by MEC at the hearing where Mr. North contended that the Distribution Agreement had been renewed for one year or, in the alternative, that the parties had entered into a new oral agreement for a six month term. Gibson's position, as set out in the pleadings is that it had explicitly refused to renew the Distribution Agreement for any term and that it had simply granted MEC the fight to continue distributing Gibson products for an additional six months as a pure accommodation to MEC and to ensure a smooth turn over to the new distributor.

We agree with the view expressed by MEC in its original Request for Arbitration. Whatever the position taken by Gibson in the pleadings it did not contest the jurisdiction of the Arbitral tribunal, a jurisdiction which necessarily depends upon the Distribution Agreement having been extended and it invokes the provisions of that agreement in its defence. We are satisfied that the offer made by Gibson to MEC in the meetings following the

Frankfurt Fair was to extend the existing Distribution Agreement for an additional six months and that this offer was accepted by MEC.

Accordingly, we agree with Mr. Falls that upon expiration of the extended period the provisions of the Termination clause would continue to apply. Mr. Falls interprets this to mean that upon the expiration of the six month additional term or upon earlier termination for cause, MEC would have no claim:

> ". . . on account of any loss of prospective profits on anticipated sales, or due to expenditures, investments, leases or other commitments of the business or goodwill of either party."

The clause just quoted forms part of the standard form contract prepared by Gibson. Taken alone it would, we believe, be conclusive against the claims made by MEC. However, it is followed by a further hand-written clause which provides that:

> "In the event of termination of this agreement, COMPANY has the obligation to deliver all backorders of currently available products, as soon as it becomes available."

The Agreement, as extended, was terminated by Mr. Derringer's letter of August 12, 1993. At that time outstanding backorders, according to MEC's Calculation, which we accept as being accurate, amounted to US $1,444,514.00. As announced in Mr. Derringer's letter, no further deliveries were made.

Mr. Falls argues that Gibson was entitled to terminate the Agreement as a result of the lawyer's letter which he described as

constituting a fundamental breach of that agreement. However, even accepting, *arguendo*, that the lawyer's letter did constitute a breach of contract, it does not follow that Gibson was thereby relieved of the obligation expressed in the passage quoted above. While the Termination clause grants Gibson the right to terminate the Distribution Agreement in the event of a breach by MEC of any of its contractual obligations under the contract, it is manifest from the language that if that right is exercised, outstanding backorders must be delivered as soon as the products in question become available.

It is a universally accepted principle of the interpretation of the contracts that individual clauses, such as the termination of liability clause relied upon by Gibson, must be read in the context of the entire contract so as to give meaning and affect to all of its provisions. The obligation to deliver backorders in the event of termination, a proviso which, we note, was added to the standard form contract following negotiations between the parties, would be emptied of all effect if Gibson could refuse to deliver and successfully rely upon the limitation of liability proviso.

As we held in the Interim Award, the Distribution Agreement is the law between the parties. Giving effect to that contract we find that Gibson was contractually obliged to deliver backorders outstanding as of August 12, 1993, the date of termination. We further find that the limitation of liability proviso does not apply to immunize Gibson from its failure to do so.

It remains to be determined whether the obligation to deliver extended to all of the backorders or only a part. This question arises because Gibson contends that the agreement made in March 1993 was that orders would be honoured to the extent possible but that shipments would cease as of September 1st no matter what the

extent of the back orders at that time might be except only for MEC orders which were themselves supported by a confirmed purchase order by an MEC customer.

We are satisfied that the intention was that all orders placed up until September 1st would be honoured. This was precisely what Mr. Derringer noted in his memorandum to file of March 22, 1993 quoted above. In that memorandum he says:

> ". . . I stated that we would fulfill these orders and any others that they had placed during the six month period. However fulfilling those orders would be dependant on our normal production capacity." (emphasis added)

An agreement that any order placed "during the six month period" will be filled clearly contemplates orders being accepted up to August 30th with deliveries being made either before or after that date as normal production capacity permits. If the intention had been to cut off deliveries on September 1st, it would have been a simple matter to provide that only orders received up to some date in advance of September 1st would be accepted. As Mr. Derringer's memorandum of March 22nd makes clear, this is not what was stated. Nor does the March 22nd memorandum support the contention that only orders for which MEC had itself received a confirmed purchase order would be honoured after September 1st. It is true that Mr. Derringer's letter of June 16, 1993 appears to impose this requirement but such a letter would be ineffective to alter the agreement previously made unless the amendment was confirmed by MEC. No such confirmation was established.

We find therefore that Gibson was under an obligation to fill all backorders outstanding on August 12, 1993 subject to their

normal production schedules even though delivery could not be made before the expiration of the extended agreement on August 30, 1993. This finding provides a sufficient basis on which to dispose of the first claim.

The third claim was dismissed by the Interim Award and it remains therefore to deal with the second in which MEC claims damages on the basis that investments which it made had not been amortized when the contract was terminated.

We conclude that this claim fails. It is clearly barred by the language of the Termination clause. Mr. North argued that MEC should be relieved of the consequences set out in that clause because of what he categorised as inequality of bargaining power between the parties and because those consequences were unconscionable. Notwithstanding Mr. North's very able submission we find that neither the pleadings nor the evidence support his conclusion. The Distribution Agreement was not imposed on MEC. Many of its clauses, including that supporting its position on the first claim constitute amendments to the text originally prepared by Gibson inserted at MEC's request. MEC cannot take the benefits of the contract free of its burdens.

During the hearing MEC contended as a discrete subset of Issue 2 that its expenses for the 1993 Frankfurt Music Fair should be reimbursed on the ground that it had incurred those expenses in reliance on assurances from Gibson that its position as distributor in Germany was not at risk. Three MEC witnesses testified that such an assurance was given by Mr. Derringer during the meeting in Nashville at which the decision to appoint a new Austrian distributor was announced. Mr. North referred at some length to that testimony in closing argument.

Counsel for Gibson took the position at the hearing and in a subsequent letter addressed to the Tribunal on August 18, 1997 that this issue was not within the issues as framed by the Terms of Reference. Mr. Falls stated in his letter of August 18th that:

> ". . . Gibson did not come prepared to try, nor had we even consented to arbitrate, claims outside and inconsistent with the written agreement, such as the theory that various oral statements allegedly made by a Gibson employee achieved contractual significance based on MEC's detrimental reliance."

As the Tribunal reiterated in a letter sent to the parties following receipt of Mr. Falls' letter of August 18th, the issues to be resolved are those set out in the Terms of Reference. We do not believe that the claim based on detrimental reliance advanced by Mr. North at the hearing is within those terms and the claim is therefore barred by Article 16 of the ICC Rules. Even if it were otherwise and the claim properly fell within the Terms of Reference, we are not satisfied that the evidence established a breach of contract which would negate the effect of the Termination clause.

Conclusions

For the reasons expressed above, our responses to the issues stated in the Terms of Reference (omitting the question of choice of law dealt with in the Interim Award) are as follows:

Issue 1:

> As to the claim for damages in an approximate amount of DM 1.3 million for the alleged failure of the Defendant to supply product ordered after February 28, 1993:

Was the Defendant under any legal obligation to fulfil orders placed by the Claimant subsequent to February 28, 1993?

Answer: Yes.

Did the Defendant fail to fulfil any such orders and thereby breach its legal obligation?

Answer: Yes.

Did the Claimant thereby suffer loss or damage and if so in what amount?

Answer: We find that the Claimant was wrongfully deprived of the standard profit margin which could be obtained on the resale of Gibson products. That margin, according to the evidence presented by MEC at the hearing, which we accept as being accurate, amounted to 50% of the landed cost of the goods. The evidence indicated that landed cost is the net export price plus 10% freight, handling and storage fees plus 6% customs duties. The net export price of undelivered backorders was US $1,444,514.00. To this then must be added US $144,451.40 representing freight handling and storage plus US $86,670.84 representing customs duties for a total landed cost of $1,675,636.24. Fifty percent of this total is US $837,818.12 which we find to be MEC's loss.

It is a principle of general application in commercial matters that an award of damages for breach of contract should, to the extent possible, fully compensate the successful party. To that end we conclude that the award should be paid with interest so as to take into account the

time value of the profit margin lost through Gibson's breach of contract. Interest should normally run from the date the breach occurred, in this case sometime in the autumn of 1993. However, MEC did not file its claim with the ICC until April 20, 1995, and Gibson should not be prejudiced by this delay. We conclude therefore that interest should run only from the date these proceedings were instituted. We find the appropriate rate to be 7.2%, being the average of the Frankfurt Inter Bank best offered 12 month rate for April 1995, April 1996 and April 1997 plus 1%.

Issue 2:

As to the claim for damages in an approximate amount of DM 900,000 on the ground that at the time the agreement terminated investments made by the Claimant at the Defendant's request had not yet been amortized.

Interpreted in the light of the applicable law does the contract support the claim made?

Answer: No.

Were any investments made by the Claimant at the Defendant's request which were not amortized at the time the contract was terminated?

Answer: In view of the answer given above the question is moot.

What is the amount of the loss?

Answer: This question likewise is moot.

Issue 3:

As to the claim for compensation in an approximate amount of DM 160,000 founded on Art. 89b of the German Law of Agencies.

Is the German Law of Agencies applicable in the circumstances? and if so;

Does that law support the claim made?

Answer: This claim was dismissed by the Interim Award.

Relief Awarded

For all of the above reasons our Award is that the Defendant pay to the Claimant the sum of $US 837,818.12 with interest at the rate of 7.2% from April 20, 1995 when these proceedings were instituted until the date of payment. In view of the terms of the Arbitration Clause in the Distribution Agreement, the ICC costs of arbitration amount to US $113,700.00 and are to be borne by the parties in equal shares. Each party also bears its own legal costs.

Dated at Nashville this 31st day of October 1997.

THE ARBITRAL TRIBUNAL

/s/_____
Eberhard Röhm, Arbitrator

/s/_____
Harold G, Maier, Arbitrator

/s/_____
Colin K. Irving, Chairman

APPENDIX D

DISTRIBUTION AGREEMENT*

[Dated: November 20, 1990]

This is an Agreement between "Gibson Guitar Corp." ("COMPANY") and "MEC Import GMBH" ("DISTRIBUTOR"). COMPANY hereby appoints DISTRIBUTOR as the sole and exclusive importer-distributor of products as listed in Exhibit A (current Price List) in GERMANY *and AUSTRIA (GIBSON products)* and DISTRIBUTOR accepts this offer.

TERM OF AGREEMENT

The Term of the Agreement is exactly from:

March 1, 1990 to February 28, 1993

This Agreement will automatically terminate at the end of this period of time. This agreement is not continuous, and cannot be renewed. If the relationship is satisfactory to COMPANY, COMPANY may offer a new agreement to DISTRIBUTOR but is under no obligation to do so.

TERMS OF SALE

A product sold to DISTRIBUTOR shall be sold on the terms listed in attached Exhibit B. All payments shall be made in U.S. dollars

* Text appearing in italics represents hand-written insertions.

($) F.O.B. shipping locale, unless otherwise noted DISTRIBUTOR will bear and pay all taxes of any nature imposed prior to, at the time of, or after delivery to, the carrier at the F.O.B. point. After delivery to the carrier at the F.O.B. point, DISTRIBUTOR shall bear all risk of loss or damage to the products.

COMPANY reserves the right to change pricing or discontinue sales of a product with 45 days notice.

The placing of on order by DISTRIBUTOR shall constitute a warranty and covenant by DISTRIBUTOR that all necessary approvals and permits required for the import-distribution of ordered product in its territory and the commensurate payments to COMPANY for such product have been obtained. If DISTRIBUTOR is not allowed to import a particular product or product line because it is legally prohibited from doing so; and consequently is not able to give to COMPANY the requested warranty and/or covenant, DISTRIBUTOR is not obliged to order this particular product line. If, because of this reason, DISTRIBUTOR is not able to meet the minimum sales target for this product line, the COMPANY cannot terminate this contract solely for this reason.

DISTRIBUTOR'S RESPONSIBILITIES

DISTRIBUTOR agrees to exert its best efforts to attain the maximum sale of all products listed in Exhibit A and refrain from weakening COMPANY's success in any way, including the sale and promotion of products competitive to those in Exhibit A except as listed in Exhibit I.

DISTRIBUTOR has done an analysis of his territory market including penetration of retail shops, market share, competitive

product offerings, and distributors carrying the competitive products. DISTRIBUTOR has formulated a strategic marketing plan based on this analysis. A summary of this analysis and plan is attached as Exhibit D.

The DISTRIBUTOR has attached all its current price lists for sales of all authorized products, including various special discounts offered as Exhibit E. The DISTRIBUTOR has sole discretion over pricing and pricing practices.

The DISTRIBUTOR agrees to maintain a minimum inventory of 12% of the annual sales quota of genuinely saleable products by product line. To meet this requirement, the inventory of Music Partners may be added to that of DISTRIBUTOR and compared to the combined total of the sales targets. The DISTRIBUTOR'S current inventory plus purchase orders meet this minimum.

DISTRIBUTOR shall purchase from the COMPANY during this contract period a minimum dollar amount of product for each authorized product line as listed in Exhibit C ("Quota by Product Line"). The agreement to distribute each product line shall be treated for all purposes as separate distribution contracts.

The DISTRIBUTOR agrees to promote and service the product as per a plan identifying:

- o sales staffing,
- o promotion and advertising budget,
- o service / order handling staff,

as attached in Exhibit G. The DISTRIBUTOR agrees to spend at least a total of 10% of product line sales revenue on the above

referenced cost categories, to directly support, promote and advertise each product line respectively.

In addition, the DISTRIBUTOR will extend credit programs and allowances to its dealers as *per current price list*.

DISTRIBUTOR shall notify COMPANY of any major changes in price, sales staffing, promotional, credit, or other programs listed in this contract.

THE COMPANY'S ARTIST RELATIONS AND PROMOTIONAL ACTIVITIES

The COMPANY has an active and aggressive program to promote its product throughout the world and has an independent organization whose responsibility is to obtain the endorsement, good will, and active participation of professional artists and other music industry professionals. This program is for the benefit of all DISTRIBUTORS, as well as the COMPANY.

DISTRIBUTOR agrees to fully cooperate with this organization to pursue various mutually beneficial promotional programs. The COMPANY shall instruct this organization to fully cooperate with the DISTRIBUTOR to pursue various mutually beneficial promotional programs.

WARRANTY AND SERVICE CONSIDERATIONS

The DISTRIBUTOR shall be responsible for all service on product purchased by the DISTRIBUTOR and shall use its best efforts to provide the best possible service to all owners of the COMPANY'S products.

Should goods purchased from the COMPANY by the DISTRIBUTOR arrive needing any service or repair, it is the DISTRIBUTOR'S sole responsibility to service and/or repair the product at the DISTRIBUTOR'S own cost. The COMPANY will fairly deal with any quality problems which may infrequently occur. The COMPANY is committed to manufacturing and/or selling products of only the highest quality and value. The COMPANY *may* in special cases, send replacement parts and/or provide other assistance to the DISTRIBUTOR.

The DISTRIBUTOR has sole discretion and responsibility on the warranty it extends to its customers, and the sole obligation to service warranty claims including any and all costs.

TRADEMARKS, COPYRIGHTS, AND OTHER PROPRIETARY RIGHTS

The DISTRIBUTOR is granted, a non-exclusive license and privilege to use trade marks, copyrights, and other proprietary rights in the promotion of the COMPANY'S products.

The DISTRIBUTOR shall not have the right to sublicense, or otherwise permit, the use of these rights by others. In addition, the use of these marks on any product which is to be sold for a profit (i.e., clothing, T-shirts, pens, cases, and other paraphernalia) must be approved by the COMPANY in advance. DISTRIBUTOR shall recognize and protect COMPANY'S right of total ownership of all trademarks and patents in association with the authorized product lines. Should any special rights to these marks be granted by local law, the DISTRIBUTOR shall notify the COMPANY of any and all infringements of these proprietary rights.

DISTRIBUTOR shall freely relinquish to COMPANY any and all such rights upon termination of this agreement and shall thereafter refrain from any further usage.

CONFIDENTIAL INFORMATION

DISTRIBUTOR shall maintain in strict confidence all business and technical information pertaining to the authorized product lines. This obligation shall continue for a least two years after termination of this agreement.

TERMINATION

COMPANY shall have the right to terminate this agreement with 60 days written *notice* at its option, if the DISTRIBUTOR:

(1) has a 50% or greater change in ownership or senior management;
(2) files bankruptcy;
(3) fails to honor payment terms;
(4) willfully submits fraudulent reports, or does not submit required reports, as specified in this contract;
(5) fails to honor any commitments made in this contract, including minimum sales targets.

DISTRIBUTOR shall have the right to terminate this agreement with 60 days written notice, at its option, if the COMPANY:

(1) has a 50% or greater change in ownership or senior management;
(2) files bankruptcy;
(3) fails to honor payment terms.

To effect termination, *either party* must give *the other* one obligatory notice of dissatisfaction, which allows *the party* a 30 day grace period to correct any deficiency of the items listed above, except for item (2). If such deficiency has not been corrected, the termination will be effective at the earlier of 60 days from the date written notice is given to *the other party* or the last day of the term of this agreement, as specified on Page 1.

Additionally, the COMPANY does retain the right to sell its product either directly or through a wholely owned subsidiary upon *360* days notice.

The quota by product line (Exhibit C) for the March 1, 1991 to February 28, 1992, and March 1, 1992 to February 28, 1993, agreement years will be determined and agreed upon annually, but in no event later than 30 days following the expiration of the prior agreement year. Failure of COMPANY and DISTRIBUTOR to agree upon annual minimum sales targets shall give the COMPANY, at its option, the right to immediately terminate this agreement.

Neither party to this agreement shall be liable by reason of termination or expiration of this agreement to the other for compensation, reimbursement, or damages on account of any loss of prospective profits on anticipated sales, or due to expenditures, investments, leases, or other commitments to the business, or the good will of either party.

In the event of termination of this agreement, COMPANY has the obligation to deliver all backorders of currently available products, as soon as it becomes available.

ARBITRATION

Should the parties have a serious disagreement relating to this contract, neither party shall seek redress against the other in any court or tribunal in any part of the world, but instead submit this agreement to arbitration. The matter to be arbitrated shall be submitted to the Arbitration Committee of the Chamber of Commerce of the State of Tennessee.

Both parties shall permit the Committee to exercise its own judgment as to the body of law it shall use in rendering its decision. The decision of the Committee shall be fully and finally binding on both parties. Neither party shall have the right to further appeal or redress in any other court or tribunal except solely for the purpose of obtain execution of the judgment rendered by the Arbitration Committee.

The parties agree to share equally all costs and expenses of such arbitration proceeding, irrespective of its outcome.

GENERAL PROVISIONS

(a) Any notice shall be in writing by certified or registered air mail sent to the signatories of this Agreement at the address noted in this Agreement evidenced by a post office receipt.

(b) The parties acknowledge that this agreement cannot be assigned without the prior written consent of the other party.

(c) This Agreement, along with any Exhibits, is the entire and only agreement between the parties on the subject matter of this Agreement, and it wholly cancels, voids, and supersedes any other agreement previously entered into between the parties.

(d) This Agreement may be modified, amended, or revised only by a written instrument executed by both parties.

(e) DISTRIBUTOR shall transact all business for its own account and has no power or authority to act as an agent for the COMPANY.

(f) DISTRIBUTOR shall comply with all applicable laws and regulations as they relate to this Agreement, and shall hold COMPANY harmless from any claim, liability, or expense arising from a violation, if legally possible.

If translations are made and executed with this English language version of the Agreement, the English language version shall control.

DISTRIBUTOR agrees to perform all legally makeable and reasonable actions which may be necessary to enforce the legality of this Agreement in its territory.

This agreement is agreed to and executed by:

COMPANY:	DISTRIBUTOR:
Gibson Guitar Corp.	MEC Import GMBH
/s/_____	/s/_____
By: David H. Berryman	/s/_____
President	
	Gerhard Veyle, President
	Friedemann Würster
Date: 9/20/90	Date: 9/20/90

ADDRESS OF RECORD:
641 Massman Drive
Nashville, Tn 37210-3781
USA

ADDRESS OF RECORD:
Otto-Konz, Str. 12
7120 Bietigheim-Bissingen
W. GERMANY

This agreement was concluded in the United States of America.

TABLE OF EXHIBITS

Exhibit	Title	Page Number
A	Price List for Authorized Product	Previously Furnished
B	Payment Terms	Attached
C	Quota by Product Line	Attached
D	Market Analysis and Strategic Plan	To be furnished by Distributor
E	Distributor's Price List for Authorized Product	To be furnished by Distributor
F	Inventory Devoted to Product Line(s)	To be furnished by Distributor
G	Promotional / Servicing Commitments	To be furnished by Distributor
	o Sates Staffing o Promotional Commitment o Service / Order Handling Staff	
H	Credit Allowance / Programs to Dealers	To be furnished by Distributor
I	All Non COMPANY Product Lines Sold by Distributor	To be furnished by Distributor

EXHIBIT B

PAYMENT TERMS
FOR M E C IMPORT GMBH

For all product lines: Check or cash in advance with a 5% discount (except special offer items which are net cash).

EXHIBIT C

QUOTA BY PRODUCT LINE
FOR M E C IMPORT GMBH

1st Agreement Year (3/1/90 - 2/28/91)

Gibson Guitars	$ 650,000
Epiphone Guitars & Amplifiers	450,000
Gibson Strings & Accessories/Parts	100,000
	$1,200,000

2nd Agreement Year (3/1/91 - 2/28/92)

Quotas to be set and agreed on no later than 3/30/91.

3rd Agreement Year (3/1/92 - 2/28/93)

Quotas to be set and agreed on no later than 3/30/92.

EXHIBIT C

QUOTA BY PRODUCT LINE
FOR M E C IMPORT GMBH

2nd Agreement Year (3/1/91 - 2/28/92)

Gibson Electric Guitars	$1,125,000	*$1,200,000*
Gibson Acoustic Guitars	140,000	*75,000*
Epiphone Guitars & Amplifiers	750,000	*600,000*
Gibson Strings & Accessories		85,000
Impulse/Gibson Pickups		25,000
Parts		15,000
	$2,140,000	*$ 2,000,000*

3rd Agreement Year (3/1/92 - 2/28/93)

Quotas to be set and agreed on no later than 3/30/92.

/s/ 3/6/91	/s/_____
Company	Distributor
Initial	Initial

EXHIBIT C

QUOTA BY PRODUCT LINE

for Agreement Year March 1, 1992 to February 28, 1993

Distributor: MEC Import GMBH

Gibson Electric Guitars	$ 1,250,000
Gibson Acoustic Guitars	75,000
Epiphone Guitars	675,000
Strings and Accessories	85,000
Guitar Parts	20,000
TOTAL	$ 2,105,000

(Gibson cases of Approx. $150,000 not included in above quota)

/s/_____ COMPANY INITIAL & DATE

/s/_____ DISTRIBUTOR INITIAL & DATE

WE REFER TO OUR STATEMENT RE. TARGET 92/93, WHICH IS ESSENTIAL PART OF THIS EXHIBIT C.

APPENDIX E

Text of Vienna Convention

Appendix A

United Nations Convention on Contracts for the International Sale of Goods

THE STATES PARTIES TO THIS CONVENTION,

BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:

PART I

SPHERE OF APPLICATION AND GENERAL PROVISIONS

Chapter I
SPHERE OF APPLICATION

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

Article 2

This Convention does not apply to sales:

(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

(b) by auction;

(c) on execution or otherwise by authority of law;

(d) of stocks, shares, investment securities, negotiable instruments or money;

(e) of ships, vessels, hovercraft or aircraft;

(f) of electricity.

Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Chapter II
GENERAL PROVISIONS

Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 8

(1) For the purpose of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 10

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

Article 13

For the purposes of this Convention "writing" includes telegram and telex.

PART II

FORMATION OF THE CONTRACT

Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) an offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

Article 18

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror

within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

Article 19

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

Article 20

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

Article 21

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the later acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

Article 22

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

Article 23

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

Article 24

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

PART III

SALE OF GOODS

Chapter I
GENERAL PROVISIONS

Article 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as

substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 26

A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 27

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

Article 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 29

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in

writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Chapter II
OBLIGATIONS OF THE SELLER

Article 30

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

Section I.
Delivery of the goods and handing over of documents

Article 31

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods – in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place – in placing the goods at the buyer's disposal at that place;

(c) in other cases – in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 32

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

Article 33

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date;

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

Article 34

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Section II.
Conformity of the goods and third party claims

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispatched by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispatch, examination may be deferred until after the goods have arrived at the new destination.

Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Article 43

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) the seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

Section III.
Remedies for breach of contract by the seller

Article 45

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

(a) exercise the rights provided in articles 46 to 52;

(b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the Seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 46

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 48

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or

uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

Article 49

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;

(b) in respect of any breach other than late delivery, within a reasonable time:

(i) after he knew or ought to have known of the breach;

(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or

(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Article 50

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

Article 51

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract,

articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 52

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

Chapter III
OBLIGATIONS OF THE BUYER

Article 53

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section I.
Payment of the price

Article 54

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under

the contract or any laws and regulations to enable payment to be made.

Article 55

Where a contract has been validly concluded but does not expressly or implicitly fix make provision for determining the price, the parties are considered, in the absence any indication to the contrary, to have impliedly made reference to the price generall charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

Article 56

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 57

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which caused by a change in his place of business subsequent to the conclusion of the contract.

Article 58

(1) If the buyer is not bound to pay the price at any other specific time, he must pay when the seller places either the goods or

documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 59

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

Section II.
Taking delivery

Article 60

The buyer's obligation to take delivery consists:

(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

(b) in taking over the goods.

Section III.
Remedies for breach of contract by the buyer

Article 61

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

(a) exercise the rights provided in articles 62 to 65;

(b) claim damages as provided in articles 74 to 77.

(2) the seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

Article 63

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

Article 64

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance by the buyer, within a reasonable time:

(i) after the seller knew or ought to have known of the breach; or

(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

Article 65

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller

may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

Chapter IV
PASSING OF RISK

Article 66

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 67

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

Article 68

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk the seller.

Article 69

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

Chapter V
PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

Section I.
Anticipatory breach and instalment contracts

Article 71

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becames apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though, the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Article 72

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

Article 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II.
Damages

Article 74

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 75

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Section III.
Interest

Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

Section IV.
Exemptions

Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be

expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

Section V.
Effects of avoidance

Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 82

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course

of normal use before he discovered or ought to have discovered the lack of conformity.

Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

Article 84

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or

(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section VI.
Preservation of the goods

Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is

either in possession of the goods or otherwise able to control their disposition the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by thc buyer.

Article 86

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreason able inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligation are governed by the preceding paragraph.

Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate

means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

PART IV

FINAL PROVISIONS

Article 89

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

Article 90

This Convention docs not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

Article 91

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 92

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

Article 93

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this

Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 94

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State,

the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 95

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1)(b) of article 1 of this convention.

Article 96

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

Article 97

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned.

However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Article 98

No reservations are permitted except those expressly authorized in this Convention.

Article 99

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of

ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the

1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary coordination in this respect.

Article 100

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1)(a) or the Contracting State referred to in subparagraph (1)(b) of article 1.

Article 101

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the

Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

Supreme Court, U.S.
FILED
MAR 15 2000
CLERK

(2)

No. 99-1358

IN THE

Supreme Court of the United States

GIBSON GUITAR CORPORATION,

Petitioner,

v.

MEC IMPORT HANDELSGESELLSCHAFT GMBH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondent, MEC Import Handelsgesellschaft GMBH, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

In this appeal Gibson seeks to avoid (or delay) payment of an international commercial arbitration award rendered by unanimous vote of three (3) highly qualified arbitrators. It was Gibson who initiated this litigation seeking to force its German distributor (MEC) to arbitrate this contract dispute in the United States rather than litigate the dispute in the courts of Germany.

The initial litigation resulted in the June 16, 1994, Consent Order to arbitrate under the rules of the International Chamber of Commerce and Arbitral Tribunal of the International Court of Arbitration.

Pursuant to the procedure adopted by the parties, each party selected an arbitrator and these individuals chose the third arbitrator.

On April 28, 1997, the Tribunal issued an "Interim Award" announcing that it would not be applying the law of Germany or the United States to the dispute but, rather, interpret the contract between the parties pursuant to recognized international principles. No objection to the Interim Award and no attempt to vacate the award was pursued by Gibson.

After a full evidentiary hearing, the Tribunal issued an award on October 31, 1997 to MEC for $837,818.12 with interest.

Though Gibson was the party who originally insisted on arbitration, it is now dissatisfied with the result and seeks to vacate the award through protracted litigation that has

delayed payment of the award for over two (2) years. Gibson's attempt to vacate the arbitration award has been denied by the U.S. District Court for the Middle District of Tennessee, and unanimously denied by the Sixth Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

An arbitration award should be vacated only in the most extreme circumstances due to the strong public policy favoring alternative dispute resolution. Commercial arbitration provides cost efficient, expeditious resolution for the parties which benefits the world economy and relieves the burden on the judicial system.

In this appeal, Gibson attempts to transpose the Arbitration Tribunal's disregard of Gibson's interpretation of the contract into a "manifest disregard of the law". While recognized in theory, no case has been found where the "manifest disregard of the law" standard was used to vacate a commercial arbitration award in the federal courts.

Applying the "manifest disregard of the law" standard is particularly inappropriate in this case where the decision of the arbitrators turned on a question of fact dealing with the intent of the parties and interpretation of a written form contract that had handwritten modifications.

The plain language of the contract quoted on page two (2) of the petition states that Gibson will have no liability under this distribution agreement for lost profits ". . . **by reason of termination or expiration of this agreement** . . .". The Arbitration Tribunal did not interpret this to mean

that Gibson was at liberty to simply refuse to perform the contract by not shipping products ordered by MEC during the term of the contract or the back-orders arising during the term of the agreement. Thus, the losses of MEC did not arise from *termination* or *expiration* of the distribution agreement but, rather, from the refusal of Gibson to perform its obligations under the contract.

The argument that the Arbitration Tribunal should have awarded some form of specific performance is without merit. This remedy was not included within the terms of reference agreed upon by the parties which framed the issues to be decided by the Arbitration Tribunal. Specific performance was raised by Gibson for the first time when it made its attempt to vacate the arbitration award in the U.S. District Court.

To articulate a standard for the application of a "manifest disregard of the law" standard in a case that largely turned on questions of fact would be tantamount to an advisory opinion.

Lastly, Gibson has avoided its financial obligations for years through protracted litigation that first sought to require arbitration but, subsequently was aimed at vacating the resulting arbitration award. This undermines the very foundation of the policies favoring alternative dispute resolution. Indeed, this form of litigation thwarts the expeditious and efficient resolution of commercial disputes normally achieved through arbitration. To accept this case for review would only serve to encourage others to burden the judicial system by seeking review of the very arbitration procedures originally intended to decrease the burden on the courts.

I. POLICY CONSIDERATIONS.

The distribution agreement between the parties contained an arbitration clause and it was Gibson that initiated litigation to enforce the arbitration clause. MEC participated in the arbitration pursuant to the Agreed Order at great expense since the arbitration hearing took place in the United States. MEC urges the Court to uphold this routine international commercial arbitration award based upon the strong public policy favoring arbitration awards.

A. This Court should enforce federal and international public policy favoring alternative dispute resolution.

The United States courts and their international counterparts have strong public policy interests in encouraging the use of alternative dispute resolution. Arbitration is a valuable method because it does not require an agreement of the parties to resolve the disputes. If consistently enforced, arbitration awards can be an effective way to terminate and resolve disputes. Congress adopted the Federal Arbitration Act to ensure that courts would rigorously enforce private agreements to arbitrate, and it established an emphatic national policy favoring arbitration, which is binding on all courts, state and federal. *Singer v. Jeffries & Co.*, 575 N.E.2d 98 (N.Y. 1991). Arbitration agreements affecting commerce are "valid, irrevocable and enforceable" in state or federal courts. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909 (1960), *cert. dismissed*, 364 U.S. 801 (1960).

In fact, these federal principles have been incorporated into arbitrations governed by the International Chamber of Commerce ("ICC"). ICC Rules of Arbitration provide that

"by submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made." ICC Rules of Arbitration, Article 24 ¶ 2.

Since arbitration is such an effective alternative dispute resolution method, the opportunity to appeal awards by judicial review undermines the original intention of alternative dispute resolution. In addition, an established standard exists under principles of contract law — "manifest disregard of the law". The standard is narrowly construed to prevent frivolous appeals. Further articulation of this standard is completely unnecessary and would encourage frivolous appeals by any party dissatisfied with an arbitration panel's decision.

Courts should be very hesitant to upset an arbitration award. *Karppinen v. Karl Kiefer Mach. Co.*, 187 F.2d 32 (2d Cir. 1951). If the grounds for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed. *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211 (2d Cir. 1972). Courts may not look into the merits of an arbitrable matter, nor may they retry matters submitted to arbitration on their merits. *Local 77, American Federation of Musicians v. Philadelphia Orchestra Assoc.*, 252 F. Supp. 787 (E.D. Pa. 1966). The reviewing court should not disturb the award of the arbitrator so long as the interpretation was not arbitrary. *Mogge v. District 8 Intern. Association of Machinists*, 454 F.2d 510 (7th Cir. 1971). In essence, Gibson wants this Court to do something no other court has done — overturn an arbitration award based on a "manifest disregard of the law".

B. In accordance with strong federal and international public policy favoring arbitration, this Court should be hesitant to upset an equitable award.

Prior to the issuance of the arbitrators' award, Gibson was the strongest advocate for arbitration as the exclusive and final remedy in this matter. Gibson acknowledges the Federal Arbitration Act favors enforcement of arbitration awards. In addition, Gibson acknowledges that lower courts recognize their ability to vacate an arbitration award where the arbitrator's decision is "in manifest disregard of the law". *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 135, 136 (6th Cir. 1996); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995). Contrary to Gibson's position, lower courts are reviewing cases under an established and articulated standard. Gibson's request to formalize this standard is unnecessary.

"An arbitrator's decision is entitled to substantial deference, and the arbitrator need only explicate his reasoning under the contract 'in terms that offer even a barely colorable justification for the outcome reached' in order to withstand judicial scrutiny." *In re: Marine Pollution Serv., Inc.*, 857 F.2d 91, 94 (2d Cir. 1988). Certainly, the arbitration panel's decision offers more than a "colorable justification" through the tribunal's well-reasoned and detailed decision-making process. The process followed by the parties in this case included an initial selection of highly qualified arbitrators, a carefully drafted Terms of Reference, an Interim Award discussing the choice of law questions (approved by the ICC in Paris), and a detailed final award (also approved by the ICC Court in Paris). Clearly, the process was not arbitrary. This Court should not allow further delay of execution on the judgment. Any delay under these

circumstances would completely undermine the purpose of the alternative dispute resolution process.

II. GIBSON IS ESTOPPED FROM OBJECTING TO THE ARBITRATION AWARD.

If this matter were being adjudicated in court, Gibson would be judicially estopped from taking a contrary position from one taken earlier in the case. A party may not await an adverse arbitration award before asserting objections on grounds that were known to the party prior to the issuance of the award. *Graphic Arts Inter. Union, Local 97B v. Haddon Craftsmen, Inc.*, 489 F. Supp. 1088 (M.D. Pa. 1979). In drafting the arbitration provision, Gibson gave the arbitrators the discretion to choose the proper body of law to use in the arbitration. Gibson stipulated that the arbitration would be "fully and finally binding on both parties." Gibson reinforced this provision by its earlier argument that the parties' "interests will be better served by arbitration than by resort to courts if problems arise." Memorandum In Opposition to Motion to Dismiss, p. 15, citing *Georgia Power Co. v. Cimmaron Coal Co.*, 526 F.2d 101, 106 (6th Cir. 1975), 425 U.S. 952 (1976). Regardless, Gibson continues to stay MEC's execution on the judgment by arguing the arbitration panel's decision was "in manifest disregard of the law".

It is undisputed that Gibson did not object to the provisions of this Interim Award until over six (6) months after the final award was issued. According to the Federal Arbitration Act, "(n)otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney *within three months* after the award is filed or delivered. 9 U.S.C. § 12 (emphasis added).

The Interim Award was the arbitrators' *final* determination of the law applicable to this arbitration and is therefore a *final award on this point*. Gibson failed to make any objection to the arbitrators' choice of law until *after* the arbitration damage award was rendered in MEC's favor. Gibson's failure to object to the choice of law provision in the Interim Award should cause it to be estopped from challenging the decision on the law to apply in the arbitration.

III. THE ARBITRATION AWARD DID NOT CONSTITUTE A MANIFEST DISREGARD OF THE LAW.

A. This Court should not review the merits of arbitration awards.

The ultimate decision of the tribunal was an interpretation of the contract and the intent of the parties. Gibson disagreed with the interpretation of the contract. However, this finding of fact cannot be converted into a "manifest disregard of the law". This Court should not review factual findings of arbitration awards. Gibson concedes it "has not challenged the factual basis of the award". Petition, p. 2.

B. This Court should not create new law based upon the facts of this case.

It is undisputed that the concept of "manifest disregard" is very narrowly applied. Gibson "acknowledges that the 'manifest disregard' standard of review is narrow." Petition, p. 6. In fact, "(i)t is well established that a mere error in the interpretation or application of law is insufficient to meet this standard." *Merrill Lynch, Pierce, Fenner & Smith, Inc.*

v. Jaros, 70 F.3d at 421. However, Gibson fails to cite any United States court that has ever vacated an arbitration award due to the "manifest disregard" standard. Therefore, Gibson cannot meet its burden to prove the award constituted a "manifest disregard of the law".

The limited statutory grounds for vacation of an arbitration award are clearly set forth in 9 U.S.C. § 10(a). A party may request a court to vacate an award "*(w)here the arbitrators exceeded their powers*, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). (Emphasis added). In this case, Gibson correctly states that an award can be vacated if the arbitrators "exceeded their powers", but Gibson cannot prove the arbitrators exceeded their powers in this case or establish any other ground for vacation of the award under Section 10(a).

The concept of "manifest disregard" was judicially created. Manifest disregard "generally remains a theoretical construct" and *no* commercial arbitration awards have been vacated on this ground. S. L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731, 776 (Spring 1996). Any application of the "manifest disregard" standard that allows a reviewing court to evaluate the merits of the arbitrator's award is "not legitimate." Hayford, *supra*, at 814. The " 'manifest disregard' of the law standard is defensible only if, in application, it effectively insulates the merits of the commercial arbitration award from such judicial interference." *Id.*

This Court has only made three collateral references to "manifest disregard" since 1953. Hayford, *supra*, at 775.

When lower courts have mentioned the concept, they have been careful to outline the narrow and specific circumstances in which it can be considered. An arbitration award based on manifest disregard of the law that is not enforced presupposes something beyond and different from a mere error in law or failure on the part of the arbitrators to understand or apply the law. *Saxis S.S. Co. v. Multifacs Intern. Traders, Inc.*, 375 F.2d 577 (2d Cir. 1967).

It is clear from case law that "a party seeking to vacate an arbitration award on the ground of manifest disregard of the law may *not* proceed by merely objecting to the results of the arbitration." *O.R. Sec., Inc. v. Professional Planning Assocs., Inc.*, 857 F.2d 742, 747 (11th Cir. 1988). Like *O.R. Sec.*, Gibson objects to the results of the arbitration. Manifest disregard of the law clearly means more than error or misunderstanding (by the arbitrator) with respect to the law. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986). In addition, (the courts) are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it. *Id.*

If courts considered the manifest disregard standard, they did so where it was sufficiently argued that the arbitrators identified the relevant law but decided to *ignore their findings* and expressly disregard the applicable law. *O.R. Sec*, 857 F.2d at 747. The arbitrators in this arbitration did not disregard applicable law. An analysis of the Interim Award demonstrates that the arbitrators outlined what they considered the thorough arguments of both parties as to the applicability of Tennessee or German law.

After hearing and considering all presented arguments, the arbitration panel unanimously concluded that the correct law to govern the arbitration was the contract itself and, in case of conflict, international principles of contract law. In *Primary Coal*, the arbitrator was urged to draft an interim award regarding the applicable law. *Primary Coal v. Compania Valenciana de Cementos Portland*, International Chamber of Commerce Case Number 5953. Also, in *Primary Coal*, the arbitrator ruled that neither Spanish nor United States law governed, but international principles of contract. After reviewing the contract and the parties' behavior, the arbitrator determined that the parties did not want either legal regime to govern the contract. After the Cour d'Appel de Paris affirmed the arbitrator's decision by citing Article 13(3) of the ICC Rules, the door was opened for the application of the generalized law of merchants.

Like *Primary Coal*, the arbitrators interpreted the contract and concluded that international principles rather than a national law were intended to govern. It is clear that the arbitrators did not determine that a national legal order governed and chose to ignore it. Rather, the arbitrators established the law to be used when terms of the contract conflicted with the national law of the parties.

The burden of proving that arbitrators acted in manifest disregard of the law is an extremely high one. *Wall Street Associates, L.P. v. Becker Paribas, Inc.*, 818 F. Supp. 679 (S.D. N.Y. 1993). This burden belongs to Gibson, who must prove that the arbitrators' decision met the narrowly-defined concept of manifest disregard. Although Gibson's counsel has frequently used the term, Gibson has not approached anything close to proving that the arbitrators actually failed to conduct their duties as set forth in 9 U.S.C. § 10(a), or in

the judicially-created, but rarely used standard of manifest disregard of the law.

C. Gibson wants the award vacated because it is displeased with the result.

It is well-established that a party may not await an adverse arbitration award before asserting objections on grounds of which he had knowledge prior to the issuance of the award. *Graphic Arts*, 489 F. Supp. 787. In fact, Gibson previously stated that it "has not levied any challenge to the arbitrability of the issues presented to the arbitrators or the qualifications of the arbitrators, nor has it otherwise challenged the mechanics by which the award was rendered".

The doctrine of manifest disregard of the law implies that an arbitrator appreciates the existence of a *clearly governing legal principle* but decides to ignore or pay no attention to it. *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Intern. Ltd.*, 888 F.2d 260 (2d Cir. 1989). Gibson mentions the New York Convention as additional applicable law that was ignored by the arbitrators. Again, if the terms of an agreement grant the arbitrators complete discretion to choose the applicable law, clearly governing legal principles do not exist in this case. Gibson's flawed logic reinforces MEC's position that Gibson is simply displeased with the arbitrator's decision.

IV. THE AWARD OF LOST PROFITS WAS AN APPROPRIATE REMEDY.

The arbitration panel awarded lost profits in accordance with the Terms of Reference and the Interim Award as damages for Gibson's failure to perform its obligations under

the distribution agreement. Prior to the final award, Gibson made no objection to the inclusion of money damages as an issue to be resolved in the Terms of Reference.

A. The arbitrators were permitted to award monetary damages as a result of Gibson's breach of the contract.

The manner of computing damages for breach of an agreement, which provided for arbitration of any dispute arising during the execution of the agreement, was for the arbitrator and not the courts. *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama, S.A.*, 312 F.2d 299 (2d Cir. 1963), *cert. denied*, 373 U.S. 949 (1963). Since Gibson failed to ship product ordered by MEC pursuant to the distributorship agreement, the arbitrators properly awarded lost profits to achieve justice among the parties. When both parties agreed to the language in the Terms of Reference, both parties knew that the award of damages was an issue. The arbitration incorporated the Terms of Reference. Therefore, Gibson cannot solely rely on the express terms of the written contract.

B. In addition to the fact that Gibson did not raise specific performance until after the final arbitration award, it is not an appropriate remedy.

An award in 1997 requiring Gibson to fill back-orders from 1993 would be outside the Terms of Reference. Furthermore, such a delivery would not be an effective remedy. Effective equitable remedies must provide a solution to the situation presented. In this case, a late 1997 award of hundreds of guitars, which were back-ordered in 1993, does not offset the aggrieved party's damages. MEC was

originally organized in 1986 for the purpose of being the exclusive distributor of Gibson guitars in Germany. Since Gibson had no other German distributor, this was a mutually beneficial relationship.

Gibson claims that the arbitration award should only allow the award of the back-ordered guitars from 1993, which is patently unfair. First, MEC has not been a distributor of Gibson guitars for almost five (5) years and, therefore, does not have the capabilities of turning a profit on this product shipment. Furthermore, the customers that ordered the guitars in 1993 have most likely obtained a replacement instrument in the intervening five (5) years. Therefore, it is probable that the customers do not need or want the product after such a delay in delivery.

Gibson attempts to argue Section 2-716(1) of the Uniform Commercial Code that "specific performance may be decreed when the goods are unique or in other proper circumstances." This argument has no merit and makes little sense. With the possible exception of custom guitars, guitars in themselves are not necessarily unique goods. While it is true that a certain kind of guitar may produce a desired sound or look, a customer who needs an instrument is not going to wait indefinitely to obtain a specific guitar. It is certainly clear that the majority, if not all, of MEC's 1993 customers did not consider the Gibson guitars they ordered to be so unique that they are still waiting to purchase them. This is especially true since there are new European dealers that have been selling Gibson guitars during this litigation.

In fact, Gibson argues MEC's position in favor of money damages when it cites Section 2-715 of the UCC. This section permits the buyer to recover "any reasonable expense

incident to the delay or other breach" by seller. *This is exactly what MEC was awarded in the arbitration.* Since specific performance is not a viable remedy, the only possible remedy is the dollar amount lost by MEC as a result of Gibson's failure to deliver product.

1. Specific performance is prohibited by law.

If Gibson had included specific performance as an issue in the Terms of Reference and presented its case for such in a timely manner, MEC would have had the opportunity to consider if such a remedy was legal. First, MEC might be acting illegally if they distributed products from Gibson after Gibson had entered into contracts for distribution with others in Germany. Second, the new distributor might well be entitled to an injunction against MEC for selling Gibson guitars in a territory exclusively reserved for their company. Third, specific performance would result in MEC distributing Gibson product without a license. If a remedy is illegal, it is not a valid remedy.

V. IF THE VIENNA CONVENTION AND THE UNIFORM COMMERCIAL CODE WERE APPLICABLE, THE ARBITRATORS' AWARD WAS APPROPRIATE.

The Interim Award precludes application of either the Vienna Convention or the Uniform Commercial Code ("UCC") as legal standards by which to determine an arbitration award in this case. Although Gibson argues that the Vienna Convention applies to this transaction, there is no legal precedent that requires that the "internationally recognized principles of contract law" set forth by the arbitrators in the Interim Award be tied to the Vienna

Convention. Again, Gibson drafted the document empowering the arbitrators to choose the applicable law and now wants to overturn the award based on the law applied in the Interim Award.

Gibson attempts to garner support for legally unsubstantiated conclusions by seeking codification of "internationally recognized principles of contract law" into completely different bodies of international law. However, even if the Vienna Convention and the UCC were found to be applicable, their provisions do not deny MEC the relief to which the arbitrators found it was entitled.

A. Application of the Vienna Convention allows for an award of monetary damages.

Gibson's assertions that the Vienna Convention prohibits the award of lost profits are without merit. The Vienna Convention clearly provides the remedy of monetary damages. If the Vienna Convention is applicable as Gibson asserts in its petition, it is mandatory to emphasize the international character of the Convention by interpreting its text without recourse to any national law as characterized by Article 7, ¶ 1. The parties may only use national law if the means of interpretation provided within the scope of the Convention fails, which cannot be found in this case.

The question as to whether the parties have agreed that their distributorship agreement shall exclude all damages can be answered by means of interpretation provided by the Vienna Convention. Article 45 of the Vienna Convention enumerates the remedies available to a buyer for a seller's breach of a contract. Article 74, which allows lost profits, is incorporated into Article 45 by reference.

Gibson contends that Article 74 has been excluded from the distributorship agreement. In fact, Gibson argues that the "Tribunal acknowledged this agreement and consciously elected to ignore it." Petition, p. 8. On the contrary, the Tribunal consciously considered the agreement since it was incorporated into the Terms of Reference.

MEC and Gibson agree that Article 6 allows the parties to alter the provisions of the Vienna Convention. Article 6 emphasizes the "primacy of contract", which is exactly the emphasis placed on the contract by the arbitrators in this case. *See* United States State Department Legal Analysis, *reprinted at* 15 U.S.C.A. Appendix (West 1997). The handwritten alterations in the distributorship agreement clearly show that the parties did *not* want to exclude all damages concerning back-orders. If the arbitrators had been obligated to apply the Vienna Convention, the handwritten alterations would have to be interpreted under its terms.

According to the arbitrators' position in its award, the handwritten alterations were meant to give effect to special provisions in favor of MEC. MEC insisted on the alterations because it had an important interest in receiving the back-orders, even upon termination of the contract. Therefore, it follows that the arbitrators interpreted this clause in such a way that damages regarding back orders should *not* be excluded. If such damages were excluded, the clause provides *no* advantage to MEC. This was essentially a determination of fact through interpretation of the handwritten language and not a determination of law. There was no award of lost profits arising from the termination of the agreement but, rather, arising from the failure of Gibson to fill the back-orders as required by the handwritten provisions of the contract.

The intention of the parties was to oblige Gibson to provide the back-ordered guitars upon termination. If the provision only allowed the remedy of specific performance in the event of non-performance, MEC would receive a completely inequitable remedy. Gibson's actions upon termination illustrate this point. Gibson signed an exclusive dealership with another distributor in Germany. Gibson's provision requiring a specific performance remedy with MEC would have directly violated its agreement with its new distributor in Germany.

B. An award of monetary damages is permissible under the UCC.

The buyer is allowed to recover "any reasonable expense incident to the delay or other breach" by seller under Section 2-715 of the Uniform Commercial Code. UCC § 2-711 allows a buyer (MEC) to recover damages for non-delivery.

Gibson points out that provisions of the Vienna Convention are consistent with the law of the United States. Although Gibson's point may be correct, it is irrelevant since the Terms of Reference is the controlling document that allows the arbitrators to select the applicable law. Gibson insinuates that Section 2-719(3) of the UCC would prevent the award of lost profits in this case. However, Section 2-719(3) reinforces MEC's award. The Terms of Reference allow lost profits, which are consequential damages caused by Gibson's breach of the contract. Therefore, the arbitrators award of lost profits is certainly not unconscionable.

All arguments of Gibson relating to specific performance should be disregarded due to the fact that Gibson did not

include this as an issue for the arbitrators to resolve in the Terms of Reference. This document represented the agreement of the parties setting forth the issues to be resolved by arbitration and new issues raised after the final award certainly do not create grounds to vacate the award.

CONCLUSION

Gibson urged a harsh and inequitable interpretation of the distribution agreement which imposed no consequence on Gibson if they simply refused to fill orders for products from MEC. Gibson here seeks to convert the disregard by the arbitrators of that interpretation into a manifest disregard of the law. The Tribunal considered the evidence and made a just and equitable interpretation that the intent of the parties was that Gibson would fill the back-orders of MEC. The review of such a decision, one which was largely a factual determination, would open a flood of litigation on the theory that any tribunal that disregards one parties interpretation of a contract is disregarding the law.

This case does not merit further review by this court. For the foregoing reasons, Petitioner's Petition should be denied.

Respectfully submitted,

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